No. 886

IN THE

Supreme Court of the United States

October Term, 1944

J. D. DRISCOLL and W. D. NOLAND, Trustees for Howard Trust Estate, Ltd., an express trust estate,

Petitioners,

against

THE HOWARD-VAUGHAN CO., INC., a corporation; JOHN D. ROCKEFELLER, JR.; STANDARD OIL COMPANY OF NEW JERSEY, a corporation; STANDARD OIL COMPANY (NEW JERSEY), a corporation; SOCONY-VACUUM OIL COMPANY INCORPORATED, a corporation; ETHYL CORPORATION (whose corporate name formerly was ETHYL GASOLINE CORPORATION), a corporation; GENERAL MOTORS CORPORATION, a corporation; E. I. DU PONT DE NEMOURS & CO., INC., a corporation,

Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America.

May it Please the Court:

The petition of J. D. Driscoll, Trustee and W. D. Noland, Trustee, respectfully presents and shows to this Honorable Court:

A. Summary of the Matter Involved

This petition for certiorari is concerned with protection and relief for the petitioners against the conspiracy and fraud of respondents in the discovery, invention and use

of tetraethyl lead in gasoline for beneficial purposes as a fuel for internal combustion engines.

Dr. Francis A. Howard was the original discoverer and inventor of the use of tetraethyl lead in gasoline for increased efficiency when used as fuel for internal combustion engines (37-40).*

Dr. Howard organized an express trust estate, and assigned his formula for the use of tetraethyl lead in gasoline as a fuel for internal combustion engines to said trust estate to be held in trust in said trust estate (187-204).

Sarah M. Howard, widow of said Dr. Howard, assigned her right, title and interest in and to the discoveries and inventions of the use of tetraethyl lead in gasoline as discovered by her husband to the trust estate to be held in trust in said trust estate (310-5).

Effective June 28, 1916, he contracted with the Howard-Vaughan Co., Inc., to manufacture and sell the tetraethyl lead compound called "VITAGAS" (212-9), which contract the said corporation did not and has not complied with (58-61).

Petitioners are the equitable and lawful owners of the formula for the use of tetraethyl lead in gasoline for the purpose of economy and efficiency when used as a fuel for internal combustion engines or motors (61-3).

The respondents and each of them, excepting the Howard-Vaughan Co., Inc., are for brevity referred to as the conspiring defendants, and the aforesaid formula would have remained secret, had it not been for the conspiring, wrongful and unlawful acts of the said conspiring respondents (44).

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* References are to pages of the printed record.

Dr. Howard protected his discoveries and inventions by the use of Copyright, Trademark and Patent, and assigned same to the aforesaid Howard-Vaughan Co., Inc., upon the representation that it would manufacture and sell the product Vitagas which it did not do in keeping with said representation made in the contract (218-9).

Respondents known as conspiring defendants had their agents wrongfully and unlawfully make application for patents for the purpose and with the intent of confiscating petitioners' property and property rights (81-120).

The lawful rights of petitioners are further supported by affidavits which conclusively establish that the original discoverer and inventor of the use of tetraethyl lead in gasoline for beneficial purposes was the aforesaid Dr. Francis A. Howard (220-309).

Both the District and Circuit Courts below denied petitioners the right to proceed in equity as provided by the Federal Rules of Civil Procedure. It is the contention of petitioners that procedure in said Courts should be allowed to be conducted under Rule 1 and Rule 81, (a), (1), of the said Federal Rules of Civil Procedure, which provide for a controversy wherein a Copyright is involved—and in this matter the assignment and use of a Copyright was obtained by fraud.

Questions Presented

1. Are petitioners entitled to protection against fraud, and against the infringement and fraudulent confiscation of their property and property rights by respondents known in the record as conspiring defendants?

2. Are petitioners entitled to the adjudication that contract be declared null and void because it was obtained by fraud, having at no time been complied with and no effort made to do so?

3. Are petitioners entitled to proceed in equity under the provisions of Rule 1, and Rule 81, (a), (1), of the Federal Rules of Civil Procedure, when a Copyright is involved in the controversy, as set forth in the record?

4. Are petitioners to be denied their right to proceed in equity by a law or rule not applicable such as Rule 8 (a) of F.R.C.P.?

B. Reasons Relied Upon for the Allowance of the Writ of Certiorari

1. The petitioners are trustees for Howard Trust Estate, Ltd., with certain property and property rights hereinbefore mentioned, among which is particularly the formula in the use of tetraethyl lead in gasoline for purposes aforesaid, which constitute an important property and property right, and a Court of equity will concern itself in protecting such rights:

   Talbot v. *Seeman* (Cranch 1), U. S. Reps. 5;
   Gibbons v. *Ogden* (Wheat 1), U. S. Reps. 9.

   Trust estates within themselves are the creatures of equity:

   Borer v. *Chapman,* 119 U. S. 587, 7 Sup. Ct. 342, 30 L. ed. 532.

   A court of equity will support the trustees in carrying out the terms of the trust:

   Clews v. *Jamison,* 182 U. S. 461, 21 Sup. Ct. 342, 30 L. ed. 1185.

The record in this matter shows that fraud is averred (63-6), and regardless of what formal and proper proceedings surround a fraud, a court of equity will disregard them all, if necessary, in order that equity and justice may prevail:

Wagg v. *Herbert*, 25 U. S. 546, 30 Sup. Ct. 218, 54 L. ed. 321.

And fraud in a court of equity, includes all acts, which a court of equity will interfere to set aside:

Moore v. *Crawford*, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. ed. 880.

Fraud is averred in the record, and courts of equity have jurisdiction to relieve in all cases of fraud:

Whitcomb v. *Schultz*, 223 Fed. 268, 138 C.C.A. 510.

Whenever the property of a party has been wrongfully misapplied, it is a ground upon which a court of equity will act:

Nat'l Bank v. *Insurance Co.*, 104 U. S. 54.

2. Petitioners contend that they have been denied their rights to proceed in equity by the decision of the District and Circuit Courts, in view of the fact that there are among other matters, a copyright controversy involved in this cause, as set forth in the record (26, 218, par. 5, 260-1, 264-6, 348-9) and Rule 1 of Rules of Civil Procedure for the District Courts of the United States, which reads as follows:

"Rule 1. *Scope of Rules.* These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the

> just, speedy, and inexpensive determination of every action."

And Rule 81 of the Federal Rules of Civil Procedure, reads as follows:

> "Rule 81. *Applicability in General*
>
> (a) *To What Proceeding Applicable*
>
> (1) These rules do not apply to proceedings in admiralty. They do not apply to proceedings in copyright under the Act of March 4, 1909, c. 320, sec. 25 (35 Stat. 1081), as amended, U.S.C., Title 17, Sec. 25, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

WHEREFORE, the petitioners respectfully submit this petition and pray that a writ of certiorari be issued out of and under the seal of this Honorable Court and that the judgment and ruling of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court and that the petitioners may have such other aid and further relief in the premises as this Honorable Court may seem just, and YOUR PETITIONERS WILL FOREVER PRAY.

Respectfully submitted,

JOHN D. DRISCOLL, Trustee,
Petitioner in Propiam Personam.

W. D. NOLAND, Trustee,
Petitioner in Propiam Personam.

MAX ROCKMORE,
W. CAMERON BURTON,
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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of the Courts Below

The opinion of the District Court, is set forth in the transcript of record between pages 115 and 117 of said record (343-51).

The judgment of the Circuit Court of Appeals, entered on November 9, 1944, is attached to the record hereof and certified by the Clerk of the Circuit Court to this Court.

II.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under provisions as follows:

Title 28—Judicial Code and Judiciary—Chap. 10, Sec. 371, provides:

"Section 371. (Judicial Code, section 256, amended.) The jurisdiction vested in the Courts of the United States in the cases and proceedings hereafter mentioned shall be exclusive of the Courts of the several States:

Fifth: Of all cases arising under the patent-right, or copyright laws of the United States." (R. S. Sec. 711; Mar. 3, 1911, c. 231, Sec. 256, 36 Stat. 1160; Oct. 6, 1917, c. 97, Sec. 2, 40 Stat. 395; June 10, 1922, c. 216, Sec. 2, 42 Stat. 635; R. S. Sec. 711, from Act Sept. 24, 1789, c. 20, Secs. 9, 11, 1 Stat. 76, 78.)

Title 28—Judicial Code and Judiciary—Chap. 2, Sec. 41. (Judicial Code, Section 24, amended.) (1)—(b) Controversy between citizens of different States. (Petitioners are residents of California.)

"(7) Suits under patent, copyright, and trade mark laws."

(R. S. Sec. 629, par. 9; Mar. 3, 1911, c. 231, Sec. 24, par. 7, 36 Stat. 1092.)

III.

Statement of the Case

The record shows that through conspiracy and fraud Dr. Francis A. Howard was deprived of his lawful rights in the use of tetraethyl lead in gasoline for beneficial purposes (63-5) and that he is the original discoverer and inventor in the use of tetraethyl lead in gasoline for said purposes (66-8), and positive proof of said facts are supported by affidavits to such effect.

The said Dr. Howard manufactured and sold large quantities of the said mixture of tetraethyl lead compound used in gasoline under the name of Vitagas (230-1; 245-6; 260-1; 269-70; 280-2; 283-6; 289-91; 304-6).

In the years of 1916 and 1917 Dr. Howard protected his discoveries and inventions in the use of tetraethyl lead in gasoline for beneficial purposes aforesaid by the use of Copyright, Trademark and Patent (53-7; 218-9; 264-7).

The record also shows that said Dr. Howard in his lifetime wrote a formula (33-4) relative to his discoveries and inventions in the use of tetraethyl lead in gasoline for beneficial purposes aforesaid, and assigned said formula in trust (35-6) and (187-204).

The record further shows, that for brevity the defendants except Howard-Vaughan Co., Inc., will hereafter be referred to as conspiring defendants (31-2).

The said conspiring defendants engaged one Thomas A. Midgley, Jr., on their behalf to apply to the United States Patent Office for patents for various and sundry chemical

compounds (81-6) and the said chemical compounds under which said patents were granted would not eliminate the motor knock and none of said patents were ever put to any commercial use, as said patents were only used by said conspiring defendants as a build-up for a background of inventions to confuse issues in relation to the use of tetraethyl lead compound in gasoline and in Vitagas for use in gasoline for beneficial purposes aforesaid.

On or about April 15, 1922, the said Thomas A. Midgley, Jr., made an application to the United States Patent Office for a patent based upon an application which contained twenty-one claims for fuels for internal combustion engines covering various and sundry compounds. The twenty-first of said claims in said application was for "a fuel for internal combustion engines comprising gasoline and tetraethyl lead," and a patent was issued by the Patent Office on said application on or about February 23rd, 1926, as patent No. 1,573,846 (87-120).

In comparing dates in the record hereof, relative to the use by Dr. Howard of tetraethyl lead in gasoline, and the use of tetraethyl lead in gasoline by the aforesaid conspiring defendants and Thomas A. Midgley, Jr., we find Dr. Howard in the years of 1916-1918, and later, producing and selling Vitagas, a tetraethyl lead compound in gasoline for the purposes aforesaid; on April 22, 1922, we find the said conspiring defendants using said Thomas A. Midgley, Jr., for the purpose of making an application to the United States Patent Office, claiming in said application in the twenty-first claim, "A fuel for internal combustion engines comprising gasoline and tetraethyl lead,"—and a patent issued to him on or about February 23rd, 1926, as patent

No. 1,573,846, which he assigned to General Motors Corporation, one of the respondents herein; and with this record the said conspiring defendants claim to be the original discoverers and inventors of the formula of, and using tetraethyl lead in gasoline.

The record itself answers the question, as it conclusively establishes proof that Dr. Francis A. Howard is alone the discoverer and inventor of the use of tetraethyl lead in gasoline, and not the conspiring defendants, and the record also establishes that the said conspiring defendants have through conspiracy and fraud unlawfully confiscated the lawful rights of petitioners in the use of tetraethyl lead in gasoline for beneficial purposes aforesaid and petitioners are the only lawful owners thereof.

IV.

Proceedings Below

The District Court made orders dismissing the bill for failure to comply with Rule 8 (a) of the Rules of Civil Procedures for the District Courts of the United States granting petitioners leave to amend under the provisions of said Rule 8 (a), which said orders constitute a denial to petitioners of the right to proceed in equity under the provisions of Rule 1 and Rule 81 (a) (1) of said Rules of Civil Procedure, as it imposes an unnecessary and unwarranted burden upon them to proceed under Rule 8 (a) in this matter.

The Circuit Court of Appeals affirmed the Orders of the District Court by granting motions to dismiss petitioners' appeal therefrom upon the ground of lack of jurisdiction.

Both Courts below denied to petitioners their lawful right to proceed in equity under the provisions of Rule 1 and Rule 81 (a) (1) of the Civil Rules of Procedure.

V.

Specification of Errors

1. The Circuit Court erred in holding that it had no jurisdiction.
2. The Circuit Court erred in holding that the orders of the District Court were non-appealable.
3. The Circuit Court erred in failing to hold that petitioners' right was to proceed in equity under the provisions of Rule 1 and Rule 81 (a) (1) of the Civil Rules of Procedure for District Courts of the United States.
4. The District Court erred in failing to uphold the complaint based upon the Copyright, Trade Mark and Patent Rights of Petitioners.
5. The Circuit Court erred in granting the motions to dismiss made by respondents.

VI.

Argument

The record shows that Dr. Howard in the years of 1915, 1916 and later, was using tetraethyl lead as a mixture in gasoline for beneficial purposes aforesaid, and that Thomas A. Midgley, Jr., for and in behalf of the conspiring defendants, applied for a patent on or about April 15th, 1922, and among 21 claims, the 21st claim in said application, was,

"A fuel for internal combustion engines comprising gasoline and tetraethyl lead," and a patent thereon was issued or about February 23, 1926, as patent No. 1,573,846; that to him, for the benefit of said conspiring defendants on said Thomas A. Midgley, Jr., was the assignor thereof to General Motors Corporation, for the benefit of said conspiring defendants, and said respondents have continually since the issuance of said patent, manufactured and sold tetraethyl lead in gasoline and are now doing so, and have done so at all times since the issuance of said patent.

And at all times since the years 1915 and 1916, the facts as aforesaid appearing in the record, clearly establish that said Dr. Francis A. Howard is the discoverer and inventor of the use of tetraethyl lead in gasoline, and that in 1939, he assigned his formula for the use of tetraethyl lead in gasoline in trust to Howard Trust Estate, Ltd., for which petitioners are the trustees; and therefore, the aforesaid conspiring defendants through conspiracy and fraud are unlawfully using and appropriating the property and property rights of petitioners by selling many thousands of licenses to said discoveries and inventions with the result that they are earning a sum estimated at several billions of dollars in profits in violation of the lawful rights of petitioners, as provided by the Federal Law of the United States, as the record shows that Dr. Francis A. Howard had a trade mark issued by the United States Patent Office under the name of Vitagas, which was the use of tetraethyl lead in gasoline for purposes as aforesaid. The Federal Law provides:

> "Title 15, Commerce and Trade—Sec. 96, Evidence of Ownership, infringement, and damage, therefor.

> The registration of a trade mark under the provisions of this subdivision of this chapter shall be *prima facie* evidence of ownership." (Feb. 20, 1905, c. 592, Dec. 16, 33 Stat. 728.) Code of laws of the United States of America.

The aforesaid Dr. Howard for a number of years prior to the issuance of the aforesaid patent No. 1,573,846 to Thomas A. Midgley, Jr., for the benefit of the conspiring defendants manufactured and sold his Copyright and Trade Mark product using tetraethyl lead in gasoline for the purposes aforesaid under the name of Vitagas, which were his discoveries and inventions, and at common law the exclusive right to it grows out of its use and not its mere adoption; and during the time that said Dr. Howard was manufacturing and selling his discoveries and inventions as aforesaid, which constituted the use of tetraethyl lead in combination with other chemicals in gasoline for use as a fuel for internal combustion engines and motors, the aforesaid Thomas A. Midgley, Jr., and Charles F. Kettering as confederates of and for the conspiring defendants (81-119), committed the aforementioned infringements and the unlawful confiscation of petitioners' property and property rights, and have continued to do so down to the present time, against the rights of petitioners and in violation of United States laws regulating the commerce power, as has been held by the Supreme Court:

Warner v. *Searle & H. Co.*, 191 U. S. 195 (1903).

And the aforesaid patents procured by the aforesaid Thomas A. Midgley, Jr., for the benefit of the conspiring defendants are a fraud and an infringement against peti-

tioners' property and property rights, discoveries and inventions, and when an infringement of such character is committed, the petitioners, who are the injured party, are entitled to protection against said conspiracy, fraud and infringement, and courts of equity have and exercised jurisdiction to accord relief in all such cases:

> *Tyler* v. *Savage*, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. ed. 82.

Petitioners contend that their bill is not subject to the provisions of Rule 8 (a) or Rule 12 (b) F.R.C.P. (355-7; 367-72), but that they may proceed in equity under the provisions of Rule 1 and Rule 81 (a) (1) F.R.C.P., and that a court of equity will always interfere to accord justice in an unfair proceeding:

> *Stratel* v. *Maxwell*, 6 Wall. (U. S.) 277.

That the Courts have so construed the provisions of Rule 81 (a) (1) of the Federal Rules of Civil Procedure is abundantly established.

In the first reported case which we have been able to find, *i.e.*, *Michelson* v. *Crowell Publishing Co.*, 27 F. Supp. 968, the District Court of Massachusetts clearly held that Rule 81 had no application to copyright suits.

So also, in the case of *Bergmann* v. *Joe Morris Music Co.*, 27 F. Supp. 985, in an action involving the infringement of the plaintiff's property under copyright, the Court said that:

> "The Federal Rules of Civil Procedure do not apply to suits under Section 25 of the Copyright Law because the Supreme Court has not, as yet, pursuant

> to Rule 81 (a) (1), 28 U. S. C. A., following Section 723 c. made them applicable thereto, by any Rule of that Court."

In the case of *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 26 F. Supp. 134, reversed on other grounds 106 F. (2d) 45, affirmed 309 U. S. 390, 60 S. Ct. 681, 84 L. Ed. 825, it was held as in the other cases that Section 81 (a) (1) of the Federal Rules of Civil Procedure did not apply to copyright actions resulting from infringements made prior to the incorporation of said rules since up to the time of the adoption of the Federal Rules of Civil Procedure the Copyright Rules, particularly Rule 1 thereof, provided that

> "the existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings instituted under Section Twenty-five (25) of the Copyright Act."

The foregoing authorities sustain the view of petitioners, particularly because the infringements by these defendants occurred at least on February 23, 1928, when Midgley obtained his patent from the Patent Office. At that time the Copyright Rules were in force and the rights of the plaintiffs were enforceable under those Rules and remained so long after 1938 when the Federal Rules of Civil Procedure went into effect.

The Federal Rules of Civil Procedure therefore were not intended to deprive plaintiffs of the rights accorded to them by the Copyright Rules, and these defendants to further their unlawful motives should not be allowed to invoke the provisions of the Federal Rules of Civil Procedure to compel petitioners to narrow their pleading in conformity

with Rule 8 (a) of the Federal Rules of Civil Procedure, because if they do, the plaintiffs will be unable to present to the District Court a true, correct and comprehensive picture of the means and methods used by the defendants to deprive plaintiffs of the property rights of Dr. Howard to which they succeeded by the assignment and will thus sanctify their improper appropriation of those rights.

The supremacy of equity over law; In case of conflict, as distinguished from concurrence, a jural relation is substantially determined by the equitable rule rather than by the legal. Since in any sovereign state, there must, in the last analysis, be but a single system of genuine law, since the various principles and rules of that system must be consistent with one another. Two conflicting rules, the one "legal" and the other "equitable" cannot be valid at the same moment of time; one must be valid and determinative to the exclusion of the other. As a mere practical matter, the equitable rule would ordinarily prove triumphant because of the superior coercive procedure and remedies of the court in equity:

> *Bennet* v. *Butterworth*, 11 How. (U. S.) 669, 13 L. ed. 859.

Petitioners are entitled lawfully to the exclusive Right in the use of tetraethyl lead in gasoline.

Article I, Section 8, Clause 8, Const. U. S. A., provides as follows:

> "Congress shall have the power * * * to promote the progress of Science and Useful Arts, by *securing* for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."